No. 1171

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E. COTTON, Copartners Doing Business under the Firm Name and Style of COTTON BROTHERS & COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANTS.

ALBERT F. JUDD,
R. W. BRECKONS,
Proctors for Appellants.

WILLIAM R. DAVIS,
Of Counsel.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ and C. E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

No. 1171.

Appellants' Brief.

This appeal has been taken by E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company from the decree rendered by the United States District Court for the Territory of Hawaii awarding damages to the appellee, Mary K. Almy, for the loss of her house-boat. This craft, being a scow with a superstructure of two stories, three rooms in the lower story and two rooms and a veranda in the upper story, was leased by the appellee, Mary K. Almy, to Cotton Brothers and Company, the appellants, under a written

indenture of lease (Record, pp. 155, 160). It was used by the appellants as a lodging-house for their laborers engaged in dredging out the bar at the entrance of Pearl Harbor on the Island of Oahu, in the Territory of Hawaii about 10 miles distant from the Port of Honolulu.

On August 4th, 1903, after the completion of this dredging contract, the appellants started to tow the house-boat from Pearl Harbor to Honolulu, using the steam tug "Kaena" for that purpose. In making up the tow, there were attached behind the house-boat, in tandem formation, two small scows and a small skiff.

The tow proceeded in this manner from Pearl Harbor toward the Port of Honolulu until it reached a point near the entrance to Kalihi Harbor. Here the house-boat became a wreck.

The appellee filed a libel in personam against the appellants in the District Court of the United States, for the Territory of Hawaii sitting as a court of admiralty, for damages in the sum of $2,500, for the total loss of the house-boat, which she alleged was caused by the carelessness and negligence of the appellants in constructing the tow, in the manner in which the tow was operated and in the selecting of the time for the tow without regard to the conditions of wind and sea prevailing. It was further alleged that the house-boat during the tow was in the possession of the appellants under the lease above mentioned.

An answer was filed by the appellants, averring that the said lease had terminated on July 29th, 1903, or

several days before the tow started, which fact was known to appellee; and that the tow was made under a special agreement between the appellants and the appellee, that the appellants should make the tow solely as a favor to the appellee and should in no manner be held responsible for any loss or damage which might occur while the boat was being moved from Pearl Harbor to Honolulu; and also denying negligence and carelessness in the selection of the time for making the tow or in the manner of constructing or operating the tow. The answer denied also that the boat was a total loss, averring that after the accident everything possible was done to preserve the boat and its superstructure from further loss or damage, and that the accident was due to the fact that the superstructure was not properly built into the scow, but that when originally constructed was merely tacked to said scow with ten-penny nails which became gradually loosened from the rocking of the scow.

The Court rendered its decision (Record, p. 121), holding appellants liable to the appellee in the sum of $1,850, and for costs, and thereafter gave and made its decree accordingly, from which Cotton Brothers and Company appealed to this Honorable Court.

Cotton Brothers and Company, appellants herein, by their assignment of errors, claim that error was committed by the District Court in the following named particulars:

1. That said Court erred in said cause in holding and deciding that the lease of the house-boat did not

contain a provision requiring her to be returned to her owner at Pearl Harbor at the termination of the lease.

2. The Court erred in holding and deciding that the capsizing of the house-boat in question was caused by the swell of the sea.

3. The Court erred in holding and deciding that the house-boat in question had open air-courses.

4. The Court erred in holding and deciding that the house-boat was in the possession of the libelees under the terms of the lease, after July 29, 1903.

5. The Court erred in holding and determining that the accident was not unavoidable.

6. The Court erred in holding and determining that the libelees failed to exercise the care and caution which the occasion required, and that the loss of the house-boat was due to such failure.

7. The Court erred in holding and determining that there was a swell which made it obviously dangerous for the house-boat to go to sea.

8. The Court erred in holding and determining that the witness Scott testified that "I would not have undertaken to tow her in such a swell," and in deciding said cause on the theory that the witness had so testified.

9. Said Court erred in holding and deciding that the libelant was entitled to recover damages from the libelees.

10. Said Court erred in making, rendering and entering its decree on the 15th day of September, A. D. 1904, that the libelant recover of the libelees damages in the sum of $1,850.00, with costs of suit.

11. Said Court erred in making, rendering and entering its decree in said cause, because its said decree is contrary to law, and to the facts as set forth in the pleadings and records in said cause.

12. Said Court erred in not making, rendering and entering a final decree in said cause in favor of the libelees.

ARGUMENT.

I.

DURING THE TOW, THE POSSESSION OF THE HOUSE-BOAT BY THE APPELLANTS WAS NOT UNDER THE TERMS OF THE LEAVE BUT UNDER A BAILMENT, THE EXPRESS AGREEMENT OF WHICH WAS THAT IN CASE OF LOSS THE APPELLANTS WOULD NOT BE HELD RESPONSIBLE.

The lease (Record, pp. 155, 160), in accordance with the terms thereof, terminated on the 29th day of July, 1903. It became the duty of the appellants then to redeliver to the appellee the house-boat at Pearl Harbor, as the lease contained a covenant on their part not to remove the boat from the limits of Pearl Harbor.

The house-boat was at Pearl Harbor when the lease was made (Record, p. 115). There was no duty upon the appellants to return the house-boat to the owner at Honolulu.

The care to be given the boat by the lessors referred to the inland waters of Pearl Harbor, and it is not likely that anyone concerned with the house-boat thought otherwise.

It is highly improbable that appellants should undertake to bring the house-boat to Honolulu without a request considered by as authority.

There can be no question but that appellants did bring the house-boat to Honolulu by the request of Mr. Almy, the husband of the appellee. No matter what Mr. Almy may say on the subject, the testimony of Mr. Agassiz, one of the appellants, must be believed. (Record, p. 97.)

The only doubt on the proposition advanced comes from the fact that appellants have been unable to prove by direct evidence that Mr. Almy was authorized by his wife to make the request which was given. Notwithstanding this absence of direct proof, it is respectfully submitted that all the circumstances in the case show Mr. Almy to have been the agent of his wife and establishes that Cotton Bros. & Co. were justified in complying with his request.

The evidence of the witness J. A. Hughes, who built the house-boat, shows that it was ordered and paid for by Mr. Almy. (Record, p. 39.)

The evidence of Mr. Agassiz shows that all arrangements relative to the leasing of the boat, such as the term of the lease, conditions relative to loss, the amount of rental, etc., were made by Mr. Almy, and that indeed, Cotton Bros. & Co. never had any dealing with Mrs. Almy concerning the house-boat until some time after the lease was executed and delivered. (Record, p. 93.)

The evidence of the witness Agassiz shows that for some time prior to the execution of the lease, Mr. Almy was in possession of the house-boat and exercised full control over the movements of the boat. (Record, p. 92.)

The evidence of the witness Agassiz shows also that under the terms of the lease the house-boat was delivered to the lessees by Mr. Almy. (Record, p. 92.)

The letter (Record, p. 162) introduced in evidence on behalf of the appellants, signed by Mrs. Almy, shows conclusively, it seems, that the owner of the house-boat was cognizant of the fact that the provisions of the lease requiring the house-boat to be delivered at the termination of the lease at Pearl Harbor, were not to be followed and that it was the desire of the owner of the boat to have the same delivered in Honolulu. In other words, as a matter of accommodation to the owner of the house-boat, the appellants undertook to deliver the house-boat at Honolulu.

As we have said above, there is no direct proof in the case that Mr. Almy was authorized to direct the delivery of the house-boat at Honolulu, or to enter into any such arrangement as Mr. Agassiz testified was entered into. Nevertheless, we contend that the testimony shows the existence of such an agency. In a great proportion of cases, agency arises not from the use of express language, or from the existence of well-defined relation, but from the general conduct of the parties. Where one person holds another out as his agent, with certain authority, he is liable for his acts on the ground

of estoppel, whether he actually intends to be bound or not. So when one with full knowledge allows another to represent him as his agent and remains silent when occasion arises for him to speak, he may be held as his principal.

In this case it is respectfully submitted that Mrs. Almy permitted her husband to so act with relation to the house-boat as to estop her from claiming that in all transactions relative thereto, her husband was not her agent. On this point we submit the following authorities:

John vs. Christian, 128 U. S. 374.
Coolidge vs. Puaaiki, 3 Haw. 810.
In re Levinho, 11 Haw. 110.
Mateson vs. Blackmer, 46 Mich. 393.
Hunt vs. Mercantile Ins. Co., 22 Fed. 503.
Reeves vs. Kelly, 30 Mich. 132.
Goss vs. Heilbing, 77 Cal. 190.
Johnson vs. Johnson, 80 Ga. 260.
Bynum vs. Miller, 89 N. C. 393.

The finding of the Court that the house-boat was in the possession of the appellants under the terms of the lease after July 29, 1903 (assignment of errors 4), apparently is not justified from the record.

It was eminently proper for the appellants to have acted upon the statements of Mr. Almy, as the agent of his wife, the appellee, in making arrangement to tow the house-boat from Pearl Harbor to Honolulu.

Mr. Agassiz, one of the appellants (Record, p. 97), testifies concerning the arrangement made by him with

Mr. Almy: "Mr. Almy asked me when we would be through with the house-boat, and I told him I thought we would be through with her in about two months; that would make it either July or August. I think I said we would be through in July. And he then asked me whether I would tow the boat to Honolulu for him, and I said yes, I would tow her back to Honolulu with my own plant as a favor to him, but I would not take any responsibility on the tow. And he said "All right; when you get through with the boat in Pearl Harbor will you tow her to Honolulu for me?" and I said "yes."

The appellants were responsible for the house-boat while it was at Pearl Harbor, but they were not responsible in the same degree of responsibility for the boat on the tow up to Honolulu.

While at Pearl Harbor, the terms of the lease governed their liability.

On the tow from Pearl Harbor, their liability was that of a gratuitous bailee.

While it is perhaps true that one may not make a contract relieving himself from the results of his own negligence (a doctrine which should not be applied where perils of the sea are concerned), yet nevertheless the degree of care to be exercised in the management of personal property, a well-recognized principle of law, is determined largely by the character of the bailment; if the Court should uphold the contention of the appellants in this case relative to the agency of Mr. Almy, it follows that the Court would find the bailment of the house-boat in question subsequent to the termination of

the lease, wholly gratuitous. The bringing of the house-boat to Honolulu was a matter of accommodation to the appellee, and to hold that a high degree of care and prudence on the part of the appellants was necessary under such circumstances, would not be justified by any principle laid down in the authorities.

Story on Contracts, sec. 702.

Parsons on Contracts, vol. 2, p. 112.

II.

THE CONDITIONS OF WIND AND SEA PREVAILING DURING THE TOW WERE NOT SUCH AS TO CHARGE THE APPELLANTS WITH NEGLIGENCE AND CARELESSNESS IN MAKING THE TOW WHEN THEY DID.

It would seem from the evidence of record of the testimony of Captain Scott (Record, pp. 60, 73), Engineer Wheeler (Record, p. 76), both of the tug engaged in the towing, and the witness Strem (Record, p. 87), there was a light trade-wind blowing at the time the tow left Pearl Harbor and that the water was smooth. The witness Scott, a qualified expert towman, testifies (Record, p. 66) that the weather was proper for the business in hand. Against this evidence we have the testimony of Mr. Dunn for the appellee (Record, p. 30), that there was a "good, fresh breeze" blowing at the time.

The Court erred, it is submitted, in believing that the witness Scott, the captain of the tug, testified: "I wouldn't have undertaken to tow her in such a swell" (Record, p. 131), and in deciding the case on the theory

that there was a swell. What the captain did say was (Record, p. 73): "No, I wouldn't have undertaken to tow her in a swell. The water was perfectly smooth. . . . . The weather was fine."

The captain further testified (Record, p. 61), that two men were lying down on the front apron of the house-boat all the time, and adds: "If there had been any sea they could not have stayed there; they would have been washed off; they would have got wet." The men in charge of the tow were qualified and competent to perform that work. Suppose the weather was as Dunn says, and they made an honest mistake of judgment as to the suitability of conditions of wind and water, the appellants should not be held responsible.

"Errors of judgment respecting the weather at the time of starting, or, in other respects, on the voyage, is no ground of liability."

The Ivanhoe, 84 Fed. 500.

Rilatt vs. The E. V. MacCaulley, Id.

III.

NEGLIGENCE IN THE CONSTRUCTION OF THE TOW WAS SOUGHT TO BE PROVEN, BUT IS NOT SUSTAINED BY THE RECORD.

Apparently appellee abandoned on the trial all attempt to show negligence except as to the construction of the tow.

From the record in this case it would hardly seem that doubts should be entertained on this point.

Captain Scott, of the "Kaena" (Record, p. 66), Engineer Wheeler, of the "Kaena" (Record, p. 78), and Cap-

tain Olesen (Record, p. 81)—Olesen, it may be noted, is an entirely disinterested witness—all testified, after having qualified as experts, that the tow was properly constructed. From the evidence of the first two of these witnesses and that of the witnesses Strem and Agassiz it is apparent that the tow was made in the following manner: *First*, the tug "Kaena"; *second*, the house-boat, 50 by 20 feet in the hull, and having a superstructure of two stories upon it, drawing 13 inches of water or thereabouts; *third*, an empty water scow, 27 by 10 feet approximately in size, and drawing about 7 inches; *fourth*, an empty anchor scow, 22 by 9½ feet approximately, drawing 6 inches more or less; *fifth*, a small skiff "which two men could pick up on the shore."

Captain Scott, Record, p. 59.
Engineer Wheeler, Record, p. 75.
Captain Oleson, Record, p. 81.
Gus Strem, Record, p. 85.
Witness Agassiz, Record, p. 99.

All of the heavy sand scows used by the appellants in their dredging operations had been brought up to Honolulu the day previous to the accident. None remaining at Pearl Harbor when the "Kaena" started to tow the house-boat to Honolulu.

Captain Scott, Record, p. 57.
Witness Agassiz, Record, p. 99.

What evidence of negligence in the makeup of the tow has the appellee shown?

Mr. Dunn is the only witness for the appellee who testifies that he saw the tow; he confirms the testimony

of the appellants' witnesses as to the order in which the tow was made up. (Record, pp. 29, 30.) It is a surmise on his part, however, that the scows following the house-boat were laden. (Record, p. 29.) There *is* direct evidence that the scows were empty until wreckage from the house-boat was placed on them after the accident. (Record, pp. 62, 76, 86.)

Captain Nielson, an expert towman and a witness for the appellee, in response to a hypothetical question testified, that the proper way to make the tow up, if the scows in this case had each been the size of the house-boat, was to put the strongest vessel next to the tug and the next strongest after her, and so on. (Record, p. 46.)

Captain Rouse testifies to the same effect and upon the hypothesis that the scows in the tow were sand scows "several times larger and heavier than the house-boat." (Record, p. 54.)

It is respectfully submitted that there is no evidence in the record as a basis for either of these hypothetical questions; that as a matter of fact the scows were each about half the size of the house-boat, and that the force of the testimony of these two expert witnesses for the appellee is to prove that the tow was properly arranged.

The appellants submit that they cannot be considered insurers in the matter of towing this house-boat to Honolulu, and call attention to the following cases in support of this doctrine.

The Webb, 14 Wall. 406, 414.
The E. Luckenback, 113 Fed. 1019.
The Czarina, 112 Fed. 541.
The Carbonero, 106 Fed. 541.
The Startle, 115 Fed. 555.

IV.

THE LIBEL SHOULD HAVE BEEN DISMISSED AS THE EVIDENCE ADDUCED BY THE APPELLEE DID NOT SHOW THAT THE NEGLIGENCE COMPLAINED OF IN THE LIBEL WAS IN FACT THE CAUSE OF THE ACCIDENT.

"It is unnecessary to consider the question of negligence unless it be first made to appear that the negligence complained of was in fact the cause of the injury. If the evidence discloses no injury traceable to the negligence complained of the libel will be dismissed."

The Aurora vs. The Republican, 25 Fed. 788.

Negligence has been variously defined.

"Negligence is a failure to do what a reasonable prudent person would ordinarily have done under the circumstances of the situation or the doing of what such person under existing circumstances would not have done."

Backus vs. Stought, 13 Fed. 69.
Harris vs. Union Railroad Co., 13 Fed. 591.
Fuller vs. National Bank, 15 Fed. 875.
Sunney vs. Holt, 15 Fed. 880.
Crandall vs. Goodrich Transportation Co., 16 Fed. 75.

"Negligence may be defined to be the doing of some lawful act in a careless, unusual and improper way, or omitting the performance of some act required by law to be done by which injury results to the person or property of another."

Stout vs. Sonix etc. Co., Fed. Cases, No. 13,503.

"Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under all circumstances of the case."

Gravelle vs. Minne. etc. Railroad Co., 10 Fed. 711.

Harris vs. Union Pacific Railroad, 13 Fed. 591.

"Negligence is the want of the exercise of that degree of care which ordinary prudent persons are accustomed to exercise under the light of similar circumstances."

Moulder vs. Cleveland etc. Railroad Co., 1 Ohio N. P. 361.

There is no rule of law presuming negligence. Negligence must be affirmatively proven.

"The burden of proof of negligence rests on the plaintiff."

Hall vs. Minne. etc. Railroad, 14 Fed. 558.

Fuller vs. Citizens' National Bank, 15 Fed. 875.

Crew vs. St. Louis etc. Railroad Co., 20 Fed. 87.

"The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it and unless he does show it he cannot recover."

Menster vs. Armour, 18 Fed. 373.

"In an action for negligence the presumption is that due care was exercised, and the burden of proof is upon the plaintiff to show by a preponderance of credible evidence that the defendant has been guilty of negligence. He must satisfy the jury that the defendant by some act or omission violated some duty; that such violation caused the injury complained of.

Crandall vs. Goodrich Transportation Co., 16 Fed. 75.

V.

THE ACCIDENT TO THE HOUSE-BOAT WAS UNAVOIDABLE.

It may happen that where a thing bailed is lost or damaged while in charge of the bailee, and the bailee attempts in no way to show how the accident happened, negligent conduct on his part may be presumed from his silence.

The accident to the house-boat is perfectly explainable. Here was a two-story structure tacked to a scow. The witness Strem, an old boat-builder by trade, describes it (Record, page 87) as follows, in response to a question as to how the accident happened: "I could not tell that, only that the house was not strong enough to stand—only tow-nailed with 20-penny nails. Them posts [pointing to model] are only so fastened, so nailed, a little bit of rocking with a high house like that when the tug went to sea would naturally, the minute you would start it, break it loose; that is what happened."

The witness Lyle, a disinterested person, corroborated this by saying (Record, p. 108) that when he examined the scow after the accident the deck of the hull was swept clean.

The witness Wheeler (Record, p. 76) says that when he first noticed anything wrong the house was "breaking away"—substantiating the above testimony.

The house was not in fact built into the scow, and because of the use to which it had been put, with cooking apparatus, furniture, etc., in the upper story, had become weakened, so that the gentle swaying incident to the towing made her give away.

An attempt was made by the appellee to show that the hull of the scow of the house-boat was constructed with air-courses which should have been closed and the witness Dunn (Record, pp. 40, 41), who testified that he had been on the house-boat four times, stated on the stand that the house-boat was so constructed.

We have the direct evidence of the witness Strem (Record, p. 88) and Scott (Record, p. 65), who had lived on the house-boat for months, that she was not built with these air-courses in the hull.

An attempt was made to prove that the house-boat during the period the appellants occupied it at Pearl Harbor had been aground, in order to make it appear probable that the seams of the hull of the house-boat had opened up. The photograph introduced by the appellee in evidence shows, however, upon a close investigation, that the house-boat was not aground, and to this effect the witness Agassiz (Record, pp. 94, 95) and

Strem (Record, p. 88) directly testified. They were continuously about the house-boat while it was being used as a lodging-house.

Witness Scott (Record, p. 72) testified that one edge of the house-boat was on the beach. If this were in fact the case, which, however, is not admitted, it could not have caused the opening of the seams of the hull. An examination made immediately after the accident showed that there was nothing the matter at that time with the hull.

Strem, Record, p. 88.
Hughes, Record, p. 37.
Lyle, Record, p. 107.

The suddenness of the accident as testified to by Captain Scott (Record, p. 74), Engineer Wheeler (Record, p. 76), and boat-builder Strem (Record, p. 86), is extremely significant. The superstructure was a top-heavy box tacked to a substantial scow with small nails. It had served its purpose for six months without showing any signs of structural weakness, and there was no indication that it was otherwise than strong. The hot tropical sun had had its effect on the boards composing the sides of the superstructure, loosening the nails at their base. Every motion on the scow had its effect to pull at the nails already loosened.

The accident was unavoidable, because it could not have been foreseen and guarded against. The appellants had no reason to believe or suppose that the house-boat could not have been successfully brought to Honolulu.

In view of the foregoing, appellants' proctors maintain:

1. Appellants' possession of the house-boat was that of a gratuitous bailee only, and did not make them responsible except for the exercise of ordinary care and prudence, which the record shows was exercised.

2. No negligence has been shown which would warrant a recovery by appellee.

3. The accident could not have been foreseen or avoided by appellants.

It is respectfully submitted that the decree of the District Court for the Territory of Hawaii should be reversed and the libel dismissed.

Honolulu, April 25th, 1905.

ALBERT F. JUDD,
R. W. BRECKONS,
Proctors for Appellants.

WM. R. DAVIS,
Of Counsel.